



**IN THE COURT OF APPEAL**

**AT MOMBASA**

**(CORAM: ASIKE-MAKHANDIA, SICHALE & J. MOHAMMED, J.J.A)**

**CIVIL APPLICATION NO. 10 OF 2020 (UR 8/2020)**

**BETWEEN**

**THE NATIONAL LAND COMMISSION.....APPLICANT**

**AND**

**THERESIA RUNJI.....1<sup>ST</sup> RESPONDENT**

**MARIETA GITONGA CHEGE.....2<sup>ND</sup> RESPONDENT**

**NAOMI KIO.....3<sup>RD</sup> RESPONDENT**

**SAMMY M. KARA.....4<sup>TH</sup> RESPONDENT**

**MIRITINI FREE PORT LIMITED..... 5<sup>TH</sup> RESPONDENT**

**(Being an application for stay of execution of the Judgment and Decree of the**

**High Court of Kenya at Mombasa (E.K. Ogola, J) dated 12<sup>th</sup> November 2019**

**in**

**Constitutional Petition No. 17 of 2018**

**\*\*\*\*\***

**RULING THE COURT**

The applicant, is under the Land Act, empowered to compulsorily acquire land for public use and pay compensation to the affected property owners. Pursuant to this mandate, the applicant compulsorily acquired 22.11 Ha of plot No. MN/VI/4805 “the suit property”, then wholly registered in the name of the 5<sup>th</sup> respondent for the construction of the Mombasa – Nairobi Standard Gauge Railway, and a compensation of Kshs. 1,475,486,845 was paid to the 5<sup>th</sup> respondent.

Later the 1<sup>st</sup> to 4<sup>th</sup> respondents filed **Mombasa Constitutional Petition No. 17 of 2018** against the applicant alleging infringement of their property rights. That in the year 2000 they were issued with letters of allotment for the suit property. They therefore sought compensation from the applicant for compulsorily acquiring it.

The applicant denied the 1<sup>st</sup> to 4<sup>th</sup> respondents’ claim to the suit property. It averred that it had compulsorily acquired the suit property from the 5<sup>th</sup> respondent who was the registered owner as per records held in the Lands Office and appropriate compensation made after due process.

In a judgment delivered on 12<sup>th</sup> November, 2019 the subject of this appeal, Ogola, J. decreed that the applicant do forthwith tabulate, assess and compensate the 1<sup>st</sup> to 4<sup>th</sup> respondents the value of the suit property as at the date of lawful acquisition plus interest thereon at commercial rates.

Being aggrieved by the said judgment and decree, the applicant filed a notice of appeal in this Court and also filed this application pursuant to Rule 5(2)(b) of the Rules of this Court seeking stay of execution of the judgment and decree pending the hearing and determination of the intended appeal. The application is premised on the grounds on its face; which are in the main, that the appeal is arguable and has high chances of success; that the appeal will be rendered nugatory if the orders sought are not granted, and that the applicant will suffer irreparably as it will be compelled to pay double compensation for the same suit property.

On arguability, the applicant maintains that the learned Judge erred in rendering judgment in favour of the 1<sup>st</sup> to 4<sup>th</sup> respondents when the suit property did not exist and that the said respondents had never been registered as proprietors of the suit property; that the judgment is erroneous in law and extremely prejudicial to the applicant; that the applicant will be forced to pay compensation twice; that the learned Judge lacked jurisdiction to determine the dispute in relation to ownership of land as such dispute is a preserve of the Environment and Land Court; and that the judgment and decree is contrary to public interest and use of public funds.

On the nugatory aspect, the applicant states that the respondents have already filed an application to enforce the judgment; that there is a high likelihood of the applicant being compelled to assess and compensate the 1<sup>st</sup> to 4<sup>th</sup> respondents; that if the execution proceeds, it may lead to loss of public funds; and that the amount involved is colossal being in excess of Kshs. 1 billion as conceded by the 1<sup>st</sup> to 4<sup>th</sup> respondents.

The 5<sup>th</sup> respondent supported the application by filing grounds in support of the application in which it claimed that the application met the threshold for granting orders sought therein as provided for under rule 5(2)(b) of the Court of Appeal Rules; that it had also filed an appeal in respect of the judgment and decree; that both the applicant and the 5<sup>th</sup> respondent stood to be greatly prejudiced, if both appeals were heard and determined after the execution process has been undertaken, and finally, that the 1<sup>st</sup> to 4<sup>th</sup> respondents do not stand to suffer any prejudice, and in any event, such prejudice can be atoned by way of an award of costs.

The applicant and the 5<sup>th</sup> respondent subsequently filed written submissions in which they reiterated the arguability of the said appeals as well as the appeals being rendered nugatory in the event that execution is allowed to proceed. The 1<sup>st</sup> to 4<sup>th</sup> respondents neither filed papers in opposition to the application nor written submissions.

We have considered the application, the affidavits and submissions of counsel and the impugned judgment. This being an application under Rule 5(2)(b) of the Rules of this Court we are precluded from making definitive conclusions in respect of the pending appeal. We leave such determination to the bench that will eventually deal with the appeal itself. Our role at this point is to determine whether or not the application meets the required threshold in respect of Rule 5(2)(b) applications.

The law in this area is settled. For an application under Rule 5(2)(b) of the Court of Appeal Rules to succeed an applicant has to demonstrate, firstly, that the appeal or intended appeal is arguable or in other words, that it is not capricious or frivolous. Secondly, that unless it is granted a stay of execution, the appeal or intended appeal, if successful, will be rendered nugatory. (See **Stanley Kang'ethe Kinyanjui vs Tony Keter & 5 Others**, [2013] eKLR.)

It is also trite that an applicant does not need to establish a plethora of arguable points as indeed one point suffices, and that an arguable appeal is not necessarily one that will eventually succeed but one that deserves consideration of this Court (See **Joseph Gitahi Gachau & Anor vs Pioneer Holdings (A) Limited & 2 Others**, Civil Application No. 124 of 2008 (ur).

On the principle on arguability, the applicant says that the learned Judge had no jurisdiction to hear the petition relating to title to land, compulsory acquisition of land, assessment and payment of compensation; that these issues fall for consideration under the jurisdiction of the Environment and Land Court; that the suit property does not exist on the ground and that the 1<sup>st</sup> to 4<sup>th</sup> respondents never had title to the suit property. We are persuaded that these issues are not idle and deserve to be ventilated and determined by this Court on appeal. We are satisfied therefore, that the applicant has demonstrated that the intended appeal is arguable.

On the nugatory aspect, we appreciate that whether or not an appeal will be rendered nugatory depends on whether what is sought to be stayed, if allowed to happen, is reversible, or if it is not reversible, whether damages will reasonably compensate the parties aggrieved. In this case, the applicant has demonstrated that the compensation sought is in excess of Kshs. 1 billion which by all standards is a colossal amount of money that may be difficult to recover from the respondents, in the event that the appeal succeeds. The 1<sup>st</sup> to 4<sup>th</sup> respondents are private citizens with no known sources of income or assets, nor have they demonstrated their ability to repay the amount in the event the intended appeal succeeds. The applicant has also raised the issue of double compensation and use of public funds. Certainly, we are persuaded that the appeal will be rendered nugatory in the event that stay orders are not granted. The application having passed the threshold set for applications under Rule 5(2)(b) of the Court of Appeal Rules, it is granted in terms of prayer two (2) of the notice of motion dated 30<sup>th</sup> January, 2020.

Costs shall abide the outcome of the intended appeal which should, in any event, be filed within 45 days from the date hereof, failing which the order of stay granted shall stand vacated.

**Dated and delivered at Nairobi this 20<sup>th</sup> day of November, 2020.**

**ASIKE – MAKHANDIA**

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**JUDGE OF APPEAL**

**F. SICHALE**

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**JUDGE OF APPEAL**

**J. MOHAMMED**

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**JUDGE OF APPEAL**

*I certify that this is a true copy of the original.*

*Signed*

**DEPUTY REGISTRAR**